

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

EFRAT UNGAR, by and through
the Administrator of his
Estate, David Strachman,
et al

C.A. NO. 00-105L

VS.

SEPTEMBER 23, 2004
10:00 A.M.

THE PALESTINIAN LIBERATION
ORGANIZATION, et al

PROVIDENCE, RI

BEFORE THE HONORABLE RONALD R. LAGUEUX,

SENIOR DISTRICT JUDGE

(Motion for Stay Pending Appeal)

FILED

APPEARANCES:

FOR THE PLAINTIFFS: DAVID J. STRACHMAN, ESQ.
McIntyre, Tate, Lynch & Holt
321 South Main Street
Providence, RI 02903

FOR THE DEFENDANTS: DEMING E. SHERMAN, ESQ.
Edwards & Angell
2800 Financial Plaza
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Court Reporter: Karen M. Zinni, RPR-RMR-CRR
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3  **ORIGINAL**

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KAREN M. ZINNI, RPR-RMR-CRR

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1 23 SEPTEMBER 2004 -- 10:00 A.M.

2 THE COURT: Good morning, everyone. The matter
3 before the Court is Estate of Yaron Ungar and others
4 versus The Palestinian Authority and others, and this
5 is Civil Action 2000-105L. This is a motion by the
6 Defendants for a stay pending appeal.

7 Will the attorneys identify themselves for the
8 record, please.

9 MR. STRACHMAN: David Strachman for the
10 Plaintiffs.

11 MR. SHERMAN: Deming Sherman for the Palestinian
12 Defendants.

13 THE COURT: All right. It's Defendants' motion.
14 I'll hear from Defendants first.

15 MR. SHERMAN: Good morning, your Honor. I do
16 not intend to be lengthy. The Palestinian Defendants
17 have taken an appeal to the First Circuit from the
18 judgment of this Court entered on July 16, 2004. By
19 this motion, the Palestinian Defendants seek a stay
20 pending appeal or at least a stay to allow them to
21 apply to the First Circuit for a stay.

22 I recognize that in light of the Court's
23 rulings, this may be an uphill battle. I would simply
24 say that, as the Court knows, this is an unusual case
25 that involves an important legal question concerning

1 the sovereign immunity of the Palestinian Defendants.

2 These Defendants have consistently taken a
3 position under *Papandreou* and other cases that they're
4 entitled to a full determination, including an appeal
5 of the issue of sovereign and governmental immunity,
6 prior to being forced to bear the burdens of
7 litigation. This issue was properly raised and
8 supported in this court and is the issue that is raised
9 in the First Circuit.

10 The failure to issue a stay will effectively
11 negate the Defendants' immunity before it is argued on
12 appeal. There is a \$160 million judgment that is
13 pending. Obviously, it will have a significant impact
14 on the Palestinian Defendants in the absence of a stay.

15 I do not intend to repeat what is in the
16 memorandum in support of our position. I believe it
17 speaks for itself. I'd simply ask that the Court
18 exercise its discretion, which we believe it has the
19 power to do, to issue a stay, either an absolute stay
20 or a temporary stay, until the matter is considered by
21 the Court of Appeals. Thank you.

22 THE COURT: All right. Mr. Strachman.

23 MR. STRACHMAN: Thank you, your Honor. Your
24 Honor, I, too, will be brief as we filed an extensive
25 memorandum. I think I'd just reference a few points.

1 First of all, as my brother indicated, he indicated
2 this is an unusual case; and as this Court has
3 repeatedly said, it's not an unusual case. It's a
4 regular, garden variety tort case that just happens to
5 be against a somewhat unique defendant or defendants.

6 Nothing in the memorandum that was filed by the
7 Palestinian Defendants shows that they have met the
8 burdens of the rules and the burdens of the decisional
9 law concerning a stay, concerning a bond, exemption
10 from that bond. They've brought no facts to bear to
11 indicate that it would create a hardship or meet any of
12 the other requirements, such as provided in Acevedo,
13 et cetera.

14 And I think one of the most salient issues with
15 respect to whether there's a likelihood of success and
16 whether there's a chance of success on appeal is
17 despite -- well, consistent with the numerous rulings
18 of this Court on basically similar kinds of issues with
19 respect to the status of the PA, in the Southern
20 District of New York in the case of *Knox*, Judge Marrero
21 issued an extensive decision this spring paralleling
22 what your Honor has ruled, what Judge Martin has ruled
23 on these very same fundamental issues.

24 They follow the decision in the *Klinghoffer*
25 case; and what's most troublesome, I believe, in

1 determining the salience of these issues at this level
2 is in the four exhibits that we filed to our memo, we
3 show that even the PA leaders themselves, Mr. Arafat
4 himself does not believe what his own attorneys are
5 arguing in this court.

6 They said in Exhibit D that the Palestinian
7 state will be created in the year 2005. Mr. Al-Kidwa,
8 who filed an affidavit in this court saying they do not
9 have a state, filed and argued in front of the tribunal
10 at the Hague, and we provided a copy of the transcript
11 of his verbatim statements indicating that there was no
12 Palestinian state.

13 And that's the sort of fundamental, underlying
14 issue here, and I think that the First Circuit will
15 rule that they were stopped from taking these alternate
16 positions in different kinds of cases. And more than
17 just sort of the estoppel and legal issue, it goes to
18 the fundamental justice of coming in and saying
19 alternate things in alternate places whenever it
20 happens to serve their interest at the moment.

21 They haven't offered to provide a bond, a
22 partial bond. They haven't offered real estate,
23 extensive holdings. They haven't come to this Court
24 with anything that would indicate that they are willing
25 to comply, and I think we can read in from that that

1 they're just not willing to at all; that Rule 62
2 talking about the bond and the local Rule 37 talking
3 about the bond requirements are very clear that a heavy
4 burden has to be met by the Defendants and has not been
5 met here. Thank you.

THE COURT: All right. The Defendants argue
essentially that the Court has discretion in granting a
stay in these circumstances and rely on cases, however,
that do not have a monetary judgment and rely on the
four-part test that's used for preliminary injunctions.

The Plaintiffs counter by saying that the First Circuit law is clear on the subject, and it is, that in a case involving a monetary judgment, the only way that a defendant can get a stay is to file a supersedeas bond; and the Court can reduce the bond below the judgment amount in exceptional circumstances.

17 In this case, starting with the reverse,
18 assuming the four-part tests apply, there is absolutely
19 no reasonable possibility that the Defendants will get
20 a reversal on appeal. This Court has ruled, I think at
21 least three times, that the Defendants do not have
22 sovereign immunity, that they are not a foreign
23 sovereign state under the applicable statutes; and
24 that's been confirmed by the conduct of officials of
25 the Defendants, not only in this case but in other

1 cases where they admit that they are not a sovereign
2 state.

3 So that issue is clear, and the Court of Appeals
4 indicated as much but sent the case back after an
5 interlocutory appeal so that the Court could consider a
6 12(b)(1) motion by the Defendant; and the Court did
7 consider that 12(b)(1) motion and ruled extensively
8 that there is no sovereign immunity in this case. So I
9 feel confident in saying that the chances of reversal
10 on appeal are between slim and none.

11 In any event, it seems to me that the Defendants
12 kept changing their position on this matter, and there
13 is some disingenuous conduct here and some attempts to
14 delay the ultimate resolution of this case. This has
15 been true throughout.

16 I advised these Defendants a long time ago that
17 the proper way to raise the defense of sovereign
18 immunity was to file an Answer and to raise the
19 affirmative defense of sovereign immunity and then I
20 would have a hearing on that matter. I would stay
21 discovery until that matter was resolved.

22 Mr. Clark came into Court and said unequivocally
23 that Yasser Arafat did not want to file an Answer in
24 this case and did not want to defend this case on the
25 merits. Then it is disingenuous to hear from that side

1 of the case that somehow they shouldn't be liable for
2 the actions of the Hamas in this dreadful killing. If
3 that's the position they take, they should have
4 defended this case on the merits. They are defending
5 other cases of a similar nature on the merits.

6 So the Defendants have only themselves to blame
7 for the position they're now in, and I can't imagine
8 that the First Circuit Court of Appeals would say at
9 this point even though you don't have sovereign
10 immunity, you should have an opportunity to defend this
11 case on the merits. That's been waived a long time
12 ago, and that's really the only argument that the
13 Defendants have at the appellate level. A number of
14 Courts have ruled the same way.

15 However, I do have some discretion in the
16 matter; and because of the size of this judgment and
17 the international implications of this judgment, I'm
18 going to require a supersedeas bond in the amount of
19 \$50 million. That's less than half the judgment.

20 So my order specifically is that there will be a
21 stay for one week until September 30th, 2004, at
22 12 noon. If the Defendants file a supersedeas bond of
23 \$50 million approved by the Court, the stay will
24 continue in effect. If the Defendants do not, the stay
25 ends at 12 noon September 30, 2004.

Are there any questions?

MR. SHERMAN: No, your Honor.

THE COURT: That's the order of the Court.

Prepare an order, Mr. Strachman.

MR. STRACHMAN: Thank you.

(Adjourned)

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C E R T I F I C A T I O N

I, Karen M. Zinni, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

Daren M. Zinni
Karen M. Zinni, RPR-RMR-CRR

Karen M. Zinni, RPR-RMR-CRR

9-23-04

Date